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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 300 and 304.

ADOLF AXELRATH,

Petitioner,

—against—

SPENCER KELLOGG AND SONS, INC.,

Respondent.

**BRIEF ON BEHALF OF SPENCER KELLOGG AND
SONS, INC., IN OPPOSITION FOR PETITION FOR
WRIT OF CERTIORARI.**

CARVER W. WOLFE,

*Attorney for Respondent, Spencer
Kellogg and Sons, Inc.*

J. NEWTON NASH,

Of Counsel.

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BRIEF ON BEHALF OF SPENCER KELLOGG AND SONS, INC., IN OPPOSITION FOR PETITION FOR WRIT OF CERTIORARI.

This petition for a writ of certiorari presents no real Federal question. The holding of the Courts below was not, as the petitioner states, that the agreement for the sale of the "Spencer Kellogg" was a nullity under the provisions of the Shipping Act and placed no obligation of performance upon the seller after a tender by a so-called assignee, but simply that the inability and failure to perform a condition precedent by obtaining the approval of the Maritime Commission of transfer of registry of the vessel, discharged the respondent of all further obligation under the contract, a determination predicated upon broad rules of general jurisprudence and not at all involving any title, right, privilege or immunity claimed by the respondent under the Federal Statute.

Section 9 of the Shipping Act of 1916, as amended by the Act of June 23rd, 1938 (Title 46, Section 808 U. S. C.) makes it unlawful "to sell" or "agree to sell" a vessel "to any person not a citizen of the

United States" without the approval of the United States Maritime Commission, and for this reason, the condition that the agreement was subject to approval of the Commission was inserted in paragraph "10" of the agreement (R. 19), and the letter of the respondent to petitioner's assignor, dated September 3rd, 1940, authorizing him to negotiate for the sale of the vessel, was subject to the same proviso (R. 14).

On October 24th, 1940, immediately after execution of the agreement of sale, respondent filed a verified application on the required Government form, which was also signed by the buyer, the Lloyd Brasileiro, with the United States Maritime Commission, requesting approval of the contract of sale and proposed transfer of registry of the "Spencer Kellogg" (R. 52-59). On December 6th, the Maritime Commission notified the respondent by telegram that its application had been denied (R. 60), and on the following day publicly announced its decision in one of its regular releases (R. 60).

In view of the obvious finality of the Commission's action, the defendant returned the payment made by the Lloyd Brasileiro on the signing of the contract by check enclosed in a letter dated December 9th (R. 61). Despite the denial of the application, the Lloyd Brasileiro's attorneys, apparently believing that their client, a Department of the Brazilian Government, might be able to persuade the Maritime Commission to reverse its ruling, returned the check to defendant's attorneys in a letter dated December 10th, stating that, as the agreement of sale provided the buyer should aid the seller in obtaining the Maritime Commission's approval, if requested, there would seem to be no objection to the Brazilian Government requesting the American Government to review the Maritime Commission's decision, and that such

request had been made (R. 62-63). But such request was without avail, as the Commission adhered to its ruling, and on December 13th the defendant again returned the initial payment to the Lloyd Brasileiro (R. 64).

At this point, a last minute effort was made to revive the transaction. On Monday, December 16th, Lloyd Brasileiro again returned the check to the respondent in a letter stating that on Saturday, December 14th, it had assigned the contract for the purchase of the "Spencer Kellogg" to Moore-McCormack Lines, Inc., a company that maintains extensive services in Brazil (R. 25). A letter to the same effect, dated the same day, was received by the respondent from Moore-McCormack Lines, Inc. (R. 26).

On December 17th respondent again returned the check to Lloyd Brasileiro, and this time it was accepted and deposited (R. 65-66). Thereafter, a number of letters were exchanged between the respondent and Moore-McCormack Lines, Inc., but Spencer Kellogg and Sons, Inc., continued to maintain that the contract was null and void and the assignment of no effect, and there the matter ended (R. 27-34). No claim has been asserted or action instituted by Lloyd Brasileiro or Moore-McCormack Lines, Inc., which clearly indicates that they have no confidence in their original position in the matter.

Some months later this petitioner, as assignee of Ferguson, brought suit to recover brokerage commissions, and, after respondent's answer was served, moved for summary judgment, pursuant to Rule 113 of the Rules of Civil Practice. This motion was denied (R. 73-75) and later, a cross-motion of the respondent for summary judgment was granted (R. 6-7). On appeal to the Appellate Division of the

Supreme Court, Second Department, the decision of the lower Court was affirmed, without opinion (R. 80), Mr. Justice Close dissenting (R. 81); and on May 28th, 1943, the decision of that Court was unanimously affirmed, without opinion, by the Court of Appeals of the State of New York (R. 83-84).

The validity of the Federal Statute was in no way involved. Nor was any title, right, privilege or immunity claimed by the respondent under the Statute in question. The New York Courts simply affirmed the well settled doctrines that a condition precedent is one which must happen before either party becomes bound by a contract, and that inability to perform the condition discharges all further obligation under the agreement.

POINT I.

Because there is no Federal question involved and the State Court decision rests upon an adequate non-Federal ground, the petition should be denied.

Where a right, title, privilege or immunity is claimed under a statute of the United States and the decision is either in favor of or against the title, right, privilege or immunity claimed, it must be specifically set up by the party claiming the revision in order to give the Supreme Court authority to revise it; it must also be a real and not a fictitious Federal question of a substantial nature; and it should appear that, though the Federal question was raised, the decision was not and could not have been made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the Federal question.

New Orleans v. New Orleans Waterworks Co., 142 U. S. 87;
Hamblin v. Western Land Co., 147 U. S. 531;
Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co., 172 U. S. 475;
Abrams v. Van Schaick, 293 U. S. 188.

None of these requirements for review are present here. There is merely the bare averment that a Federal question is involved, presumably because the State Courts ruled that the respondent was discharged from any further contractual duty by reason of its inability to perform a condition precedent which incidentally involved a Federal Statute. This statement is wholly insufficient to sustain jurisdiction.

New Orleans v. New Orleans Waterworks Co., *supra*;
Clarke v. McDade, 165 U. S. 168;
Mutual Life Ins. Co. v. McGrew, 188 U. S. 291;
Sawyer v. Piper, 189 U. S. 154;
Goodrich v. Ferris, 214 U. S. 71.

The Pilot, 42 Fed. (2d) 290, referred to in the petitioner's brief, has no bearing whatever on the issues in this case. That case, which arose before Section 9 of the Shipping Act of 1916 was amended by the Act of June 23rd, 1938 (Title 46, U. S. C., Sec. 808, 52 Stat. 964), so as to provide that it is also unlawful to "agree to sell" a vessel documented under the laws of the United States for transfer to foreign registry without approval of the Maritime Commission, involved a libel by the Government for forfeiture of the vessel for violation of the Statute

requiring approval of such sales. The Court held there were no grounds for forfeiture as the vessel had not been transferred when seized and, hence, no provision of the Statute had been violated. In the instant case, the New York Courts simply applied well-settled rules of general jurisprudence, which have no relation to the validity of the Statute or a privilege or immunity claimed thereunder.

POINT II.

The ruling of the New York State courts was based upon well settled principles of law and should not be disturbed.

Conditions precedent, such as the one contained in the agreement of sale in this case, are common. The rule of law applicable thereto is stated in the opinion of Justice Clifford in *Jones v. United States*, 96 U. S. 24, at page 28, as follows:

“Conditions, says Story may be either precedent or subsequent, but a condition precedent is one which must happen before either party becomes bound by the contract. Thus, if a person agrees to purchase a cargo of a certain ship at sea provided the cargo proves to be of a particular quality, or provided the ship arrives before a certain time, or at a particular port, each proviso is a condition precedent to the performance of such contract; and unless the cargo proves to be of the stipulated quality or the ship arrives within the agreed time or at the specified port, no contract can possibly arise. *Story, Contr.* 33.”

See also, *Williston on Contracts*, Revised Ed., Sec. 666-A.

Under this rule, the approval of the Maritime Commission had to be obtained before the parties became bound by the agreement. If, as Justice Stoddard stated in his opinion in the New York Supreme Court (R. 74), the agreement had not been made subject to such approval, it would have been void and unenforceable under the settled rule that a contract or sale directly prohibited by statute is wholly void.

Sturm v. Truby, 245 App. Div. 357;

Restatement of the Law of Contracts, Section 580;

Williston on Contracts, Revised Edition, Section 1763.

Though application to the Commission for approval of the sale and transfer of registry was duly made, it was not and could not be obtained. Since the condition precedent could not be fulfilled, the respondent was discharged of any further contractual duty under the agreement of sale, and the subsequent last minute assignment to Moore-McCormack Lines, Inc., was of no binding force and effect.

Del Monte Dress Co., Inc. v. Royal Indemnity Co., 154 N. Y. Misc. 751;

Restatement of the Law of Contracts, Sec. 458.

As the condition that approval of the sale by the Maritime Commission be obtained, set forth in the letter addressed to Ferguson authorizing him to negotiate the sale of the vessel, could not be performed, no commissions were earned, and the petitioner is entitled to no recovery.

The doctrine of the New York Court of Appeals cases relied upon by the petitioner that contracts, which might be performed lawfully even though state and local licenses for particular uses or purposes could not or had not been obtained, may be enforced, is not applicable to the facts of this case.

Raner v. Goldberg, 244 N. Y. 438, and *Shedlinsky v. Budweiser Brewing Co.*, 163 N. Y. 437, involved leases of property, the former to run a dance hall and the latter a saloon, the operation of which necessitated obtaining local licenses, which were denied. In neither of the cases, however, did the lessee guard against the possible failure to obtain these licenses in the contract. The Court held that the contracts were not in themselves unlawful, that the lessees were bound, and that the use of the premises in the manner contemplated by the lease was only unlawful because the contingency that the license might not be granted had arisen.

In *Zwirn v. Galento*, 288 N. Y. 428, Galento was required to pay Jacobs' administrator the percentage of earnings on an exhibition arranged in New Jersey pursuant to a contract contemplating a series of exhibitions, because the condition that the agreement be approved by the New York State Boxing Commission could not possibly have any application to an exhibition held in New Jersey where the contract was lawful and could be performed even though no license from the New York authorities had been obtained.

Under the law applicable to the instant case, the condition precedent must occur before either party was bound, performance was entirely dependent upon

approval of the Maritime Commission and the contract, without the condition, would have violated a Federal statute and been unlawful *per se*.

CONCLUSION.

It is respectfully submitted that the application for certiorari should be denied.

Respectfully submitted,

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J. NEWTON NASH,
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